No. A22A1149

In the

Court of Appeals of Georgia

Wells Fargo Clearing Services, LLC, d/b/a Wells Fargo Advisors, LLC and Jay Windsor Pickett III,

Appellants,

v.

Brian Leggett and Bryson Holdings, LLC,

Appellees.

On Appeal from the Superior Court of
Fulton County, Civil Case No. 2019-CV-328949

BRIEF OF APPELLANTS WELLS FARGO CLEARING SERVICES, LLC, D/B/A WELLS FARGO ADVISORS, LLC AND JAY WINDSOR PICKETT III

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PART ONE

After an arbitration that followed the agreed upon rules set forth by the Financial Industry Regulatory Authority ("FINRA"), a mutually selected and accepted, three-person, neutral FINRA arbitration panel unanimously entered a final arbitration award (the "Award") in favor of Appellants Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors ("WFA") and Jay Windsor Pickett, III ("Mr. Pickett"). In the Award, the arbitration panel found, among other things, that Appellees Brian Leggett and Bryson Holdings, LLC ("Bryson Holdings") (collectively "Leggett") made false statements during the arbitration proceeding and WFA did not engage in any of the acts or omissions that Leggett had alleged against WFA and Mr. Pickett.

Leggett then filed a motion to vacate the Award before the Superior Court of Fulton County. Although it is well settled under the Federal Arbitration Act ("FAA") that "[j]udicial review of arbitration awards is 'narrowly limited,' and the FAA presumes that arbitration awards will be confirmed," the trial court signed an Order (drafted by Leggett's counsel) vacating the Award. *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1310 (11th Cir. 1998); *see also Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1190 (11th Cir. 1995). Those "narrowly limited" circumstances are not present here, as there has never been a factual or legal basis sufficient to overcome the presumption of confirming the Award. In fact,

shortly before the trial court signed the Order, the Georgia Supreme Court issued a ruling reaffirming that trial courts "are severely limited in vacating an arbitration award so as not to frustrate the legislative purpose of avoiding litigation by resort to arbitration." *Adventure Motorsports Reinsurance, LTD, et al. v. Interstate Nat'l Dealer Serv.*, 313 Ga. 19, 25 (2021) (citation omitted). WFA made sure that the trial court judge was aware of the *Adventure Motorsports Reinsurance, LTD* case, but the court made no effort to distinguish it. Instead, the trial court did the very thing that the Georgia Supreme Court stated that trial courts should not do – frustrate the legislative purpose of arbitration by engaging in the extraordinary act of vacating the Award.

By signing the draft order written and submitted by Leggett's counsel, the trial court vacated the Award notwithstanding that the factual findings in its Order are false and wholly unsupported by the record. If this Court does not reverse, the trial court will have effectively deprived WFA of the benefit of the written contractual bargain that it had struck with Leggett. Consistent with the Congressional mandate in the FAA and the case law construing it, the parties freely bargained to resolve their disputes in an arbitration that would not be second guessed in court. The trial court's legal errors destroyed that bargain—thus undermining the well-established policy in favor of both arbitration and freedom of contract.

The trial court's decision also defeats the important policy principles undergirding the FAA, which the United States Congress passed to encourage arbitration. If trial courts are permitted essentially to apply *de novo* review to an arbitrator's discretionary decisions and substitute their own judgment for those closest to the issues, the entire arbitration process will be rendered useless. Put simply, the trial court's decision removes all of the benefits of arbitration and has the effect of discouraging arbitration agreements—exactly the opposite of what the FAA was intended to accomplish.

The lower court's decision also effectively squanders significant resources that FINRA and the parties expended to reach the Award. The parties spent over a year litigating this case. The arbitrators held several prehearing conferences and presided over an evidentiary hearing that lasted over a week with many hours of testimony. The panel then considered its ruling for four weeks before rendering a unanimous decision. The trial court swept all of this away after a relatively brief hearing and signed a copy and paste order that Leggett's counsel had drafted. The trial court committed five errors of law that are subject to *de novo* review. The trial court erred by:

(1) Determining that the FINRA arbitrator selection process employed in this case violated 9 U.S.C. § 10(a)(4) of the FAA;

(2) Determining that the arbitrators' decision to not postpone the hearing violated 9 U.S.C. § 10(a)(3) of the FAA;

(3) Determining that the arbitrators' decision to not hear certain evidence violated 9 U.S.C. § 10(a)(3) of the FAA;

(4) Determining that the Award was procured by fraud in violation of 9 U.S.C. § 10(a)(1); and

(5) Determining that the arbitrators exceeded their authority under 9 U.S.C. § 10(a)(3) by awarding cost and fees to WFA.

While each individual error is facially independent of the others, the trial court's entire review of the Award was tainted by any one of these five errors of law. Appellants request that the Court reverse the trial court's order and instruct the trial court to enter a judgment consistent with a ruling confirming the Award as WFA requested.

Statement of Facts

A. Leggett Initiates the FINRA Arbitration Against WFA and Pickett

On April 27, 2017, Leggett filed the underlying arbitration (the "Arbitration") before the self-regulatory organization for the securities industry, FINRA. R. 4-436. FINRA is overseen by the United States Securities and Exchange Commission. *Id.* at 386. In the Arbitration, Leggett alleged that Mr. Pickett had mismanaged

Leggett's securities investments and that WFA was liable for financially harming Leggett. *Id*. at 436–37.

Leggett had previously executed a written Client Agreement with WFA that governed the relationship between the parties. R. 4-418–34. The Client Agreement included a pre-dispute arbitration clause requiring the parties to arbitrate any and all disputes between them before FINRA in accordance with FINRA's arbitration rules. *Id*. at 419–20. Under the FINRA rules, three arbitrators hear evidence and decide the case after the parties engage in a rank, strike, or challenge for cause process to select the three arbitrators. *Id*. at 419–20, 1064.

1. The FINRA Arbitrator Selection Process

FINRA Rule 12403 (the "Arbitration Selection Rules") describes and governs the arbitration selection process. R. 4-687-89. Under the Arbitration Selection Rules, each party receives a list of 35 potential neutral arbitrators ("Arbitrator Selection List") broken down into three different categories for each party to rank, strike, or challenge for cause. *Id*. at 687. These categories are a potential: (1) Chairperson; (2) non-public arbitrator; and (3) public arbitrator. *Id*. There are ten potential Chairpersons to rank, strike or challenge for cause, ten potential non-public arbitrators to rank, strike or challenge for cause, and fifteen potential public arbitrators to rank, strike or challenge for cause. *Id*.

For each of the 35 potential arbitrators, FINRA sends Arbitrator Disclosure Reports to all parties, containing background information about the arbitrators (including their employment history, education, potential conflict disclosures and a summary of experience drafted by the arbitrator) to allow the parties to better assess which arbitrators to rank, strike, or challenge for cause. *Id*. The cover letter in which the Arbitration Selection List is enclosed describes the rank and strike process and, important here, describes the manner in which FINRA allows a party to challenge a potential arbitrator for cause without using a strike. *Id*. at 704–08.

Rank and Strike

Each party is allowed up to four strikes in the Chairperson category, parties can strike all arbitrators in the non-public arbitrator category and parties can strike up to six arbitrators in the public arbitrator category. *Id*. at 687-88. For the arbitrators who are not stricken, the parties rank them in the order of the parties' preference for each category. *Id*. The parties do not disclose to each other their respective rankings and they are filed confidentially with FINRA. *Id*. FINRA then reviews the lists, eliminates the potential arbitrators that both parties had stricken and, based upon the parties' rankings, appoints three arbitrators, including one arbitrator as the Chairperson. *Id*. at 688.

"Challenges for Cause"

In addition to the rank and strike system described above, FINRA Rule 12407 expressly authorizes the Director to remove an arbitrator "for conflict of interest or bias, either upon request of a party or on the Director's own initiative." R. 4-691. The FINRA Rules do not impose a limitation on any party as to how many challenges for cause can be made, nor is there a limitation as to when they can be made. *Id*. The cover letter that each party receives concurrent with the Arbitrator Selection List describes this challenge for cause process as follows:

> Challenges for Cause
>
> In addition to allowing parties to strike proposed arbitrators on the ranking lists prior to appointment, FINRA rules also provide parties with the right to challenge arbitrators for cause. **Before the commencement of any hearing or pre-hearing conference, FINRA rules provide that FINRA *will* grant a party's request to remove an arbitrator if it is reasonable to infer that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration.** The interest or bias must be definite and capable of reasonable demonstration, rather than remote or speculative. FINRA rules also provide that FINRA will resolve close questions regarding challenges to an arbitrator made by a customer in favor of the customer.

R. 4-706 (emphasis added).

FINRA Rule 12407 adds that "[t]he Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the

time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration." *Id*.[1]

2. The Parties' Panel Selection Process

In the Arbitration, FINRA sent counsel for the parties an initial Arbitrator Selection List on June 20, 2017. R. 4-704-827. The list included Fred Pinckney as a potential public arbitrator to rank, strike, or challenge under the FINRA rules. *Id*. at 773-75. Mr. Pinckney had a bad history with WFA's counsel, Terry Weiss, in an arbitration proceeding in which Mr. Weiss had represented a different firm, Merrill Lynch. *Id*. at 829–30. Mr. Weiss filed a motion to vacate the arbitration award in the Merrill Lynch case and, in doing so, Mr. Weiss alleged that Mr. Pinckney had engaged in misconduct. *Id*. Bloomberg News wrote an article about Mr. Weiss's Merrill Lynch vacatur filing. R. 2-156–57. Bloomberg News quoted Mr. Pinckney's response to the vacatur filing: "Weiss. . . sensed that he was losing the case and repeatedly 'exploded at the panel.'" *Id*.

Based upon Mr. Pinckney's quoted reaction, Mr. Weiss challenged Mr. Pinckney for cause in this arbitration by asking for Mr. Pinckney's removal from the Arbitrator Selection List pursuant to FINRA Rule 12407 and the "Challenges for Cause" section of the cover letter. R. 4-706, 829–30. In the request, Mr. Weiss stated

[1] FINRA Rule 12103 grants the Director of FINRA Dispute Resolution Services (the "Director") authority to perform all the administrative duties relating to arbitrations submitted under the Code. *See* R. 4-684. A Director may then delegate his or her duties where appropriate. *Id*. at 704. Directors often delegate their authority to a FINRA Case Administrator who will handle the FINRA-specific administrative matters. *See id*.

that "Mr. Pinckney had served on another FINRA arbitration panel in which I was lead counsel for Merrill Lynch, *Postell v. Merrill Lynch Pierce Fenner & Smith, Inc*., FINRA Arbitration No. 09-07121." *Id*. at 829-30. The request further stated that: (1) prior to the rendering of the award in that case, Mr. Weiss had "contacted FINRA to report Mr. Pinckney's egregious and outrageous conduct exhibited during that arbitration hearing;" and (2) Merrill Lynch then "publicly accused Mr. Pinckney of violating federal law, FINRA rules and ABA arbitrator standards of conduct, among other things, by exhibiting evident partiality, misbehaving such that Merrill Lynch's rights were prejudiced, and exceeding their powers." *Id*. Mr. Weiss's letter also stated that, "[b]ecause the challenge was public and made serious allegations about Mr. Pinckney's personal conduct at the [prior] hearing, there is an appearance of potential bias from Mr. Pinckney." *Id*. at 829. Mr. Weiss copied Leggett's counsel on this request. *Id*. Leggett opposed Mr. Weiss's challenge for cause. R. 2-134–35. Mr. Weiss submitted a reply and Leggett submitted a surreply. R. 2-156-57, 162–63. Leggett's opposition (and surreply which included the unfounded allegation of a "secret agreement" between Mr. Weiss and FINRA) did not dispute any of the facts that were set forth in Mr. Weiss's challenge. *Id*.

By letter dated July 17, 2017, the FINRA Case Administrator informed the parties that Mr. Weiss's request pursuant to FINRA Rule 12407 had been granted. R. 4-838. This decision by FINRA was in accordance with the FINRA Rules stating

that "FINRA *will* grant a party's request to remove an arbitrator if it is reasonable to infer that the arbitrator is biased [or] lacks impartiality." *Id*. at 706. That same day, FINRA substituted Mr. Pinckney with Candace Stewart as one of the ten potential arbitrators in the public category of the Arbitrator Selection List. *Id*. at 840–958. The potential arbitrators from whom the parties could select in the other two categories, the Chairperson and the non-public arbitrator, remained the same. *Id*.

In response to Leggett's allegation of a "secret agreement" between Mr. Weiss and FINRA, FINRA issued correspondence to the parties on August 18, 2017 ***expressly denying*** any such agreement. R. 2-249.

After FINRA removed Mr. Pinckney as a potential arbitrator in the public category pursuant to FINRA Rule 12407 and replaced him with Ms. Stewart under the FINRA Rules, the Arbitration Selection Process continued pursuant to the FINRA Rules, ultimately resulting in the selection of Robert Lestina as the Chairperson, and Scott Schweber and Kenneth Canfield as the public arbitrators. *See generally* R. 4-389–90. By Ms. Stewart not being selected, it necessarily follows that one or both parties had either struck her or she was not as highly ranked by the parties as those who were picked. *See id*.

About one month after the arbitrators were selected, WFA learned that arbitrator Kenneth Canfield's law firm had just taken on representation of a party in a recently filed lawsuit against WFA in state court. R. 4-961. Mr. Canfield did not

disclose said representation to the parties. *Id*. at 960. Because Mr. Canfield stood to benefit financially from the outcome of this separate litigation in his capacity as a named partner at the law firm that was representing the plaintiff in the other litigation against WFA, Mr. Weiss concurrently emailed the Case Administrator and Leggett's counsel on August 25, 2017 asking for the removal or recusal of Mr. Canfield pursuant to FINRA Rules 12406 and 12407 because he had an interest in a matter adverse to WFA. *Id*.; R. 2-167–68. Leggett's counsel filed an opposition to this request on August 30, 2017. R. 2-172–76. On September 1, 2017, the Case Administrator informed the parties, in writing, that FINRA had granted the request to remove and replace Mr. Canfield. R. 4-997.

Leggett's counsel, at FINRA's request and per the FINRA Rules, then agreed to replace Mr. Canfield as an arbitrator by allowing FINRA to compile a "short list" of potential replacement arbitrators in the public category. R. 4-979. Pursuant to this agreement, FINRA provided a list of three potential replacement arbitrators for Mr. Canfield. *Id*. at 981. Charles White and two other potential arbitrators were on this list. *Id*. After each party separately submitted their rankings, FINRA appointed Charles White to replace Mr. Canfield. *Id*. at 1007. The final selected arbitrators were Robert Lestina, Scott Schweber, and Charles White. *Id*. 1064–73.

After the arbitration panel was appointed, the panel held an initial pre-hearing conference. *Id*. at 1064-73. During the initial pre-hearing conference, the parties ***expressly accepted*** Lestina, Schweber, and White as the arbitrators. *Id*. at 1065.

3. Pre-Hearing Discovery

Before the Arbitration hearing, the parties exchanged over 21,000 pages of documents pursuant to the FINRA Discovery Rules. *Id*. at 391. Those exchanges occurred at multiple agreed-upon times before the scheduled September 24, 2018 Arbitration hearing. *Id*.; *see also* R. 4-1064–73.

FINRA Rule 12514 requires the parties to exchange documents and witness lists at least 20 days before the Arbitration hearing. *Id*. at 694. In this case, that date would have been September 4, 2017. Here, pursuant to the FINRA Rules, the parties agreed in writing to amend the final document and witness exchange date to September 10, 2018. R. 4-1075. On September 6, 2018, WFA produced 1,882 pages of documents, which included 98 pages of text messages with Leggett (i.e., already in his possession), 247 pages of a Leggett corporate account and a report on Leggett's log-on activity on the WFA website. *Id*. at 392. On September 10, 2018, Leggett produced 1,619 pages of documents, which included emails and text messages that WFA had never received, and new reports prepared by Leggett's expert. *Id*. at 392.

Also on September 10, 2018, the same date on which Leggett produced 1,619 pages of documents to WFA and four days after WFA produced 1,882 documents to Leggett, Leggett asked the arbitrators to postpone the Arbitration hearing from September 24, 2018 and reschedule it for a later date. R. 4-1093. In support of this request, Leggett stated the following: (1) "the parties have continued to engage in document exchanges even through today, and counsel for both parties are still digesting literally thousands of pages of key documents…" and (2) "it is obvious that the hearing will not be completed in the time initially allotted." *Id*. The arbitration panel denied Leggett's request. *Id*. at 1118.

4. Relevant Issues from the Arbitration Evidentiary Hearing

A. Jacob McKelvey's Testimony

The Arbitration evidentiary hearing began on September 24, 2018 and continued through September 27, 2018. R. 4-441. On September 27, 2018, one of WFA's attorneys became ill and the hearing was postponed. *Id*. at 393, 441; R. 5-1242. Counsel for Leggett had just started the cross-examination of Jacob McKelvey, a WFA employee, when the hearing was postponed. *Id*. The arbitrators and parties agreed to reschedule the hearing, which resumed on June 24, 2019. R. 4-441. The testimony that occurred between September 24, 2018 through September 27, 2018 has never been a part of the trial court's record in this case. In June 2019, Mr. McKelvey's testimony resumed on cross-examination. R. 5-1242–43. Mr.

McKelvey testified about text messages, solicited trades, and unsolicited trades in June 2019.

During Mr. McKelvey's June 2019 testimony, Mr. Weiss orally clarified for the arbitrators a perceived discrepancy concerning a trade date versus a settlement date. *Id*. at 1245. Mr. Weiss referenced an expert "Bates" report that would be offered by WFA and stated that it was "based on settlement dates, not trade date[s], so it wouldn't be the same as the date of the other thing." *Id*. Mr. Weiss furthered that "just to make sure everybody clear, that's three days late, because it's settlement date." *Id*. Arbitrator Schweber then asked Mr. Weiss for clarity to which Mr. Weiss responded "[R]ight. Three days' difference on the stock." *Id*.

Additionally, although discovery had closed in September 2018, Leggett requested, for the first time during the evidentiary hearing in June 2019, WFA's corporate text messaging policy. R. 5-1260–61, R. 4-397. At the time Leggett requested the policy, Leggett's counsel confirmed that he had the opportunity to request it earlier, pursuant to WFA's offer in discovery, but chose not to. R. 2-54. WFA produced the newly requested documents to Leggett three days after receiving Leggett's request. *Id*. Leggett never used the documents during the Arbitration.

B. The Proposed Charles Schwab Witness

Leggett called Peter Flynn to testify as an expert witness on the topic of "FINRA rules/regulations." R. 4-1120. During cross-examination, Mr. Flynn

provided testimony that revealed that Mr. Leggett had been untruthful in response to a question that one of the arbitrators had asked Mr. Leggett during his testimony. *Id*. at 394–95. In an apparent effort to impeach Mr. Flynn's testimony (his own expert), Leggett asked the arbitration panel to permit him to call a representative of the brokerage firm of Charles Schwab as a witness to discuss Mr. Leggett's then current trading conduct. R. 2-19. Leggett made this request in June 2019, and he had not previously disclosed this potential witness by the agreed upon September 10, 2018 deadline. *Id*.; R. 4-1120. WFA objected to Leggett's request. *Id*. The arbitrators denied Leggett's request and stated that "[w]e don't feel as if anything would be added by the Schwab representative, and that's our ruling." R. 2-78–79.

C. The Summary Report of Solicited and Unsolicited Trades

Also during the Arbitration hearing, the arbitrators told both parties that they wanted either side to submit a single report of trades across all of Leggett's brokerage accounts specifying how many of those trades were solicited (i.e., trades recommended by WFA) and how many were unsolicited (i.e., trades that were directed by Leggett and not recommended by WFA). R. 4-614–15. WFA's counsel informed the panel that WFA's experts had previously created a report to that effect and could provide the report to the panel. *Id*. The panel acknowledged that receiving such a report "would be great." *Id*. On June 25, 2019, Peter Klouda of the Bates Group updated the report to reflect a summary of Leggett's solicited and unsolicited

trades. *Id*. at 1127–30. The underlying information had already been exchanged in discovery and did not supply any new data—this was just a readily accessible summary. *Id*. at 674. On June 28, 2019, counsel for WFA attempted to use the summary report during direct examination of a witness. *Id*. at 673. Leggett objected, arguing that the report had been recently prepared (which was done at the behest of the arbitrators) on June 25, 2019. *Id*. In response, WFA reminded the panel that the underlying documents supporting the summary in the report had been produced and had already been the subject of witness testimony. *Id*. at 674. WFA then provided Leggett's counsel with the report to review and the arbitrators recessed the hearing to provide Leggett's counsel the opportunity to make sure that the account information summary was accurate. *Id*. at 676–79; R. 5-1240. That same day, the arbitrators allowed Leggett's counsel to examine Mr. Klouda, which he did. *Id*. at 1241. Mr. Weiss prefaced Klouda's testimony by stating that Klouda was only "prepared to testify about the solicited versus unsolicited trades." R. 5-1241. Leggett then proceeded to question Mr. Klouda. *Id*. Leggett then objected to admission of the report into evidence and the arbitrators overruled the objection. *Id*.

5. The Arbitration Award

On July 31, 2019, the arbitration panel issued the Award in WFA's favor, denied all of the allegations in the Amended Statement of Claim, which included a denial of Leggett's allegations concerning the panel selection process that followed

the FINRA Rules. R. 3-436–44. The arbitration award states, in pertinent parts, the following:

> Upon consideration of the full record of evidence, including the documents and testimony, the Panel finds that the claims asserted by Claimants against Respondent Pickett, and the allegations concerning Non-Party McKelvey set forth in Claimants' Statement of Claim, are without merit and false. Specifically, the Panel finds that the losses sustained by Claimants were solely caused by the trading strategy devised, implemented and undertaken by Claimant Leggett . . . . The Panel finds that neither Respondent Pickett nor Non-Party McKelvey engaged in any wrongful conduct. Claimant Leggett alleges that he was misled by both Respondent Pickett and Non-Party McKelvey. The Panel finds that neither Respondent Pickett nor Non-Party McKelvey misled Claimant Leggett in any way, and that these allegations are without merit and false. **Claimant Leggett's testimony as to these issues was not credible.**
>
> By e-mail dated April 18, 2016 Claimant Leggett accused Non-Party McKelvey of misleading him with respect to a call option on Amazon. Claimant Leggett's testimony was that Claimant Leggett did not have option experience, did not know how options worked, that he relied on Non-Party McKelvey, and Non- Party McKelvey misled him. However, in a text message from Claimant Leggett to Non-Party McKelvey, dated April 13, 2016, Claimant Leggett stated, "anytime I've ever put in an option to sell it [sic] a certain strike it should automatically execute . . . ." **The Panel concluded from this text message that Claimant Leggett did have option experience, that his testimony to the contrary was untrue, and that his complaints about Non-Party McKelvey were false and untrue.**
>
> …
>
> The Panel's decision to grant the expungement requests of Non-Party McKelvey and Respondent Pickett is buttressed by the Panel's conclusion that Claimant Leggett was not a credible witness, and his complaints about Non-Party McKelvey and Respondent Pickett were false and untrue. **Claimant Leggett's testimony was inconsistent and untrue, his testimony was in conflict with the documents entered**

> **into evidence, and his testimony was not corroborated by the documents**.

R. 3-439–40 (emphasis added).

FINRA Rules 12902, 12904 and 12212 allow the arbitrators to impose the forum fees and costs assessed in FINRA arbitrations. FINRA Rule 12212(a) gives the arbitrators broad authority to issue sanctions including "[a]ssessing monetary penalties payable to one or more parties," "[a]ssessing postponement and/or forum fees," and "[a]ssessing attorneys' fees, costs and expenses." R. 4-686. FINRA Rule 12902(c) provides that "[in]n its award, the panel must also determine the amount of any costs and expenses incurred by the parties under the Code or that are within the scope of the agreement of the parties, and which party or parties will pay those costs and expenses." *Id*. at 699. As allowed by the foregoing FINRA Rules, the panel awarded WFA and Mr. Pickett their costs and arbitration forum fees in the amount of $51,000. *Id*. at 439–42.

B. Petition to the Trial Court

On October 30, 2019, Leggett filed a Petition and Motion to Vacate in the Superior Court of Fulton County. R. 2-4, 7. WFA and Pickett filed their response in opposition to the Motion to Vacate and their Motion to Confirm on December 30, 2019. R. 4-356, 378. Leggett opposed the Motion to Confirm on January 29, 2020. R. 5-1187. The Court held a hearing on the parties' motions on November 9, 2021. R. 6-1.

C. Trial Court Order and Appeal

On January 25, 2022, the trial court issued an Order granting Petitioner's Motion to Vacate and denying Respondents' Motion to Confirm (the "Order"). R. 5-1229–1266. The Order describes five alleged violations of 9 U.S.C. § 10(a):

1. That the parties' arbitration selection process violated § 10(a)(4) when the Case Administrator removed Mr. Pinckney from the list of potential arbitrators and removed Mr. Canfield after he was appointed as an arbitrator;
2. That refusing Leggett's request on September 10, 2018 to postpone the Arbitration hearing scheduled to begin on September 24, 2018 violated § 10(a)(3);
3. That the arbitrators violated § 10(a)(3) when the arbitrators: (1) decided that they did not "feel as if anything would be added by the Schwab representative, and that's our ruling" and (2) permitted limitations on Mr. Klouda's testimony;
4. That the award was procured by fraud based on perjury from Mr. McKelvey, misrepresentations from Mr. Weiss, and the delay in exchanging WFA's text messaging policies and procedures, in violation of § 10(a)(1); and

5. That the arbitrators' costs and fees award violated § 10(a)(3) because the award did not comply with FINRA Rule 12902(c).

R. 5-1229-1266.

On February 23, 2022, Respondents filed a Notice of Appeal, which was docketed with Court of Appeals on March 15, 2022.

PART TWO

A. Jurisdictional Statement

This Court has jurisdiction over this appeal pursuant to Article VI, Section VI, Paragraph II of the Georgia Constitution and O.C.G.A. § 15-3-3.1(a)(6) because this is not a case reserved to the Supreme Court of Georgia or conferred on any other court by law.

B. Enumeration of Errors

1. The trial court exceeded its authority under 9 U.S.C. § 10(a)(4) when it determined that the arbitrator selection process violated the FAA.
2. The trial court exceeded its authority under 9 U.S.C. § 10(a)(3) when it determined that the arbitrators' refusal to postpone the Arbitration hearing violated the FAA.
3. The trial court exceeded its authority under 9 U.S.C. § 10(a)(3) when it determined that the arbitrators (1) refused to hear testimony from the

Charles Schwab representative and (2) permitted Mr. Klouda to testify about his summary concerning solicited versus unsolicited trades.

4. The trial court exceeded its authority under 9 U.S.C. § 10(a)(1) when it determined that the arbitration award was procured by fraud.

5. The trial court exceeded its authority under 9 U.S.C. § 10(a)(3) when it held that the arbitration award violated 9 U.S.C. § 10(a)(3) by imposing costs and fees against Leggett although they are permitted under FINRA Rule 12212 and 12902.

PART THREE

A. Standard of Review

On an appeal of a trial court's order vacating an arbitration award, the Court of Appeals applies the same standard of review established by the Eleventh Circuit, that questions of law are reviewed *de novo* and findings of fact are reviewed for clear error. *Wells v. Wells-Wilson*, 360 Ga. App. 646, 648 (860 SE2d 185) (2021) (citing *EGI-VSR v. Mitjans*, 963 F3d 1112, 1121 (III) (11th Cir. 2020)).

B. Argument and Citation of Authority

Under the FAA, a court may only vacate the arbitration award in the following limited circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;

> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)–(4). Substantial deference is given to the decisions of the arbitrators and the FAA "imposes a heavy presumption in favor of confirming arbitration awards" and "a court's confirmation of an arbitration award is usually routine or summary." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842–43 (11th Cir. 2011); *Johnson v. Directory Assistants Inc.*, 797 F.3d 1294, 1301–02 (11th Cir 2015) ("To vacate an award, under §10(a)(4), '[i]t is not enough to show that the arbitrator committed an error—or even serious error.") (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013)).

1. The Panel Selection Process Did Not Violate 9 U.S.C. § 10(a)(4).

Section 10(a)(4) only permits a reviewing court to vacate an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." "Because arbitrators derive their power from the parties' agreement, we look to the terms of the governing arbitration clause to determine the powers of the arbitration

panel." *White Springs Agric. Chems., Inc. v. Glawson Invs. Corp*., 660 F.3d 1277, 1281 (11th Cir. 2011). This review is "quasi-jurisdictional" in that the trial court merely checks to make sure that the arbitration agreement granted authority for the conduct in dispute. *Gherardi v. Citigroup Global Mkts., Inc*., 975 F.3d 1232, 1238 (11th Cir. 2020). Therefore, "[o]nly if the arbitrator acts outside the scope of his contractually delegated authority. . . may a court overturn his determination." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013). The parties and FINRA followed the agreed upon FINRA Rules with respect to the selection of the three-person arbitration panel.

First and foremost, Leggett waived all arguments concerning the arbitrator selection process because Leggett expressly accepted all three arbitrators during the initial pre-hearing conference without objection. R. 4-1065; *Celasco v. Merrill Lynch, Pierce, Fenner & Smith Inc*., 2019 U.S. Dist. LEXIS 135524, *18-19, 2019 WL 5209394 (S.D. Fla. Aug. 9, 2019) ("Parties who participate in arbitration proceedings, without objection, risk waiving their objections to the proceedings."). Leggett's waiver is further demonstrated by his failure to argue during the Arbitration that the arbitrators were biased against him— nor did Leggett challenge any of the selected arbitrators for cause or strike them during the "rank and strike" arbitrator selection process. In fact, Leggett ranked all of the selected arbitrators.

Even if Leggett had not waived acceptance of the arbitration panel, vacatur is inappropriate here because FINRA scrupulously followed its rules and there is not valid basis to conclude that FINRA had exceeded its authority. The trial court made three erroneous determinations in support of its findings under Section 10(a)(4). First, the court determined Leggett was denied the "contractual right to a neutral, computer-generated list of potential arbitrators" when FINRA removed Mr. Pinckney. R. 5-1253. Second, the trial court concluded that "FINRA provides any client Terry Weiss represents with a subset of arbitrators in which certain arbitrators . . . are removed from the list." *Id*. Third, the court determined that FINRA exceeded its authority by removing Mr. Canfield as an arbitrator because the parties were "fully aware of Mr. Canfield's potential conflict of interest prior to their selecting him to serve as arbitrator." *Id*. at 1254. As set forth below, FINRA and the parties followed the FINRA Rule with respect to Mr. Pinckney's removal and Mr. Canfield's removal and "it was not the province of the district court, nor is it the province of this court, to determine whether the [FINRA] arbitrator committed an error, even a serious error, in interpreting [the FINRA Rules]." *Sanchez v. Elizondo*, 878 F.3d 1216, 1218 (9th Cir. 2018).

The parties and FINRA followed the FINRA Rules at every step of the panel selection process. During the Arbitration, all parties received a list of potential arbitrators pursuant to Rule 12403 of the FINRA Rules. R. 4-687-89, 704-827.

Under Rule 12407, and as stated in the cover letter that FINRA sent to the parties with a list of potential arbitrators, the parties could challenge an arbitrator for cause for a reasonable inference of bias. R. 4-691. If FINRA determines that it is reasonable to infer that the arbitrator is biased, FINRA "will" grant the moving party's challenge. Mr. Weiss challenged Mr. Pinckney for bias under FINRA Rule 12407. R. 4-829–30; R. 2-156–57. Mr. Weiss provided direct evidence of bias through his firsthand description of what had occurred between Mr. Weiss and Mr. Pinckney in another case involving another one of Mr. Weiss's clients, and he submitted to FINRA a Bloomberg article in which Mr. Pinckney made an unsolicited and unflattering statement about Mr. Weiss's behavior and advocacy in the prior FINRA case. R. 2-156–57. In his objections to Mr. Weiss's request, Leggett's counsel did not present any facts that contradicted Mr. Weiss's evidence. *Id*. FINRA then determined that there was a reasonable inference of bias by Mr. Pinckney against Mr. Weiss, removed Mr. Pinckney's name from the list, and replaced his name with the name of another potential arbitrator. R. 4-840–958. Each side then used the rank and strike process for all three categories of potential arbitrators as provided by the Arbitration Selection Rules. *Id*. at 687–89. After this rank and strike, the three-person panel was appointed in accordance with the applicable FINRA Rules.

Later, Mr. Canfield's removal as an arbitrator and replacement also followed the FINRA Rules. FINRA provided the parties with detailed information about the potential arbitrators whereby, among other things, the potential arbitrators were required to disclose potential conflicts to the parties. Mr. Canfield never disclosed that his law firm—of which he was a name partner—had sued WFA after he was selected as an arbitrator. R. 4-960. Because Mr. Canfield stood to financially benefit from the outcome of this lawsuit in his capacity as a partner at the law firm that was representing litigants against WFA, it was reasonable for FINRA to infer, after Mr. Weiss alerted FINRA of the conflict, that Mr. Canfield had "a direct or indirect interest in the outcome of the arbitration" sufficient to warrant removal for cause under FINRA Rules 12406 and 12407. R. 2-167–68, R. 2-172–76, R. 4-997.

After Mr. Canfield was removed in accordance with the FINRA Rules stated above, FINRA provided a short list of potential replacement arbitrators for the parties to rank and strike to replace Mr. Canfield. *Id*. at 981. Leggett agreed to this procedure. After each party separately submitted their rankings to FINRA, FINRA appointed a replacement arbitrator for Mr. Canfield. *Id*. at 1007.

FINRA and the parties complied with the applicable Arbitration Selection Rules at every turn. Notably absent from the trial court's Order is an assessment of whether FINRA complied with the applicable arbitration rules or an analysis of the selection rules. The reason why is simple: an analysis of the facts in conjunction with

the FINRA rank, strike and challenge rules leads to the conclusion that FINRA and the parties followed the FINRA Rules. *Id*.

The trial court's Order also states that "without notification to any parties," there was a "secret agreement" between Mr. Weiss and FINRA not to include the *Postell* arbitrators (such as Mr. Pinckney) in Mr. Weiss's cases. R. 5-1253–54. The evidence states otherwise. FINRA sent an email to both parties expressly denying the existence of Leggett's allegations of a secret agreement. R. 2-249. There is no evidence in the record to the contrary. The parties followed the FINRA Rules every step of the way.

2. The Arbitrators' Decision Not to Postpone the Arbitration Hearing Does Not Warrant Vacatur.

Section 10(a)(3), in relevant part, permits a reviewing court to vacate an arbitration award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . . by which the rights of any party have been prejudiced." The standard here is not whether the arbitrators *could have* postponed the hearing or even if they *should have* postponed the hearing. Instead, the Court must assess whether the three arbitrators were "guilty of misconduct" when they denied Leggett's request to postpone the hearing. *See Carina Int'l Shipping Corp. v. Adam Maritime Corp*., 961 F. Supp. 559, 567 (S.D.N.Y. Mar. 27, 1997) (citing *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G*., 579 F.2d 691, 703 (2d Cir. 1978)). In assessing misconduct, the court

must determine whether there was any reasonable basis for not postponing the hearing. *See Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1016 (11th Cir. 1998) ("[W]e must decide whether there was any reasonable basis for failing to postpone the hearing to receive relevant evidence" and "a mere difference of opinion between the arbitrators and the moving party as to the correct resolution of a procedural problem will not support vacatur under section 10(a)(3)."); *Johnson*, 797 F.3d at 1301 (where the Court reasoned that the party moving for vacatur must show there was no reasonable basis for the arbitrator's refusal to postpone the hearing); *Schmidt v. Finberg*, 942 F.2d 1571 (11th Cir. 1991). And even if there was no reasonable basis not to postpone the hearing, the moving party must still establish that it was prejudiced by the refusal. *Id.*; *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 400 (5th Cir. 2006) ("Absent even a representation that the materials [plaintiff sought additional time to review] were important to his case or that a continuance might have altered the outcome of the arbitration, we cannot conclude that [plaintiff] was deprived of a fair hearing."). FINRA Rule 12601 affords arbitrators with the discretion to postpone a hearing at the request of a party. R. 4-695.

Here, Leggett requested that the arbitrators postpone the hearing because: (1) "the parties have continued to engage in document exchanges even through today, and counsel for both parties are still digesting literally thousands of pages of key

documents…" and (2) "it is obvious that the hearing will not be completed in the time initially allotted." R. 4-1093.

First and foremost, Leggett ultimately received the postponement that he wanted because the hearing was continued for nine months shortly after it commenced. Therefore, Leggett was not prejudiced by the denial. He had ample time—nine months—to review the produced documents and prepare accordingly. Neither Leggett nor the trial court has identified any actual prejudice.

Additionally, Leggett did not ask the arbitrators to state a reason(s) why they denied the request. R. 4-1118. One can infer that a delay would have been unreasonable because the case had already been pending for over a year and a half. *See Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1411–12 (11th Cir. 1990) (explaining that a Court may rely upon inferences from the facts of a case when assessing grounds for vacatur). One can also infer that there were scheduling conflicts as to when a delayed hearing could be rescheduled since it even took nine months for the parties to reconvene the hearing after having to recess for a medical emergency.[2]

The trial court concluded, without any evidentiary support, that a delay was "necessitated not by the Investors' failure to prepare but rather due to Wells Fargo's

[2] The medical emergency causing the Arbitrators to extend the arbitration hearing is not at issue in this case. R 6 – 29:11-17. Nor is the length of time that passed between the start of the arbitration hearing (September 24, 2018) and the restart (June 24, 2019). *Id.*

late production of documents outside the time periods set forth by the FINRA Code of Arbitration Procedure." R. 5-1256. In making this statement, the trial court ignored the undisputed fact that the parties had mutually agreed to extend their document exchange deadline through September 10, 2018 and WFA produced documents on September 6, 2018 while Leggett did not produce documents until the September 10, 2018 deadline. R. 4-1075, R. 4-392.

3. The Arbitrators' Refusal to Hear Certain Evidence Did Not Violate 9 U.S.C. § 10(a)(3).

Section 10(a)(3) further permits vacatur if the trial court determines the arbitrators, "refus[ed] to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." "[A] mere difference of opinion between the arbitrators and the moving party as to the correct resolution of a procedural problem will not support vacatur under section 10(a)(3)." *Scott*, 141 F.3d at 1016. "Arbitrators enjoy wide latitude in conducting an arbitration hearing, and they are not constrained by formal rules of procedure or evidence." *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007). "Arbitrators have substantial discretion to admit or exclude evidence. *LJL 33rd St. Assocs., LLC v. Pitcairn Props.*, 725 F.3d 184, 195 (2d Cir. Jul. 31, 2013). *Rai v. Barclays Cap. Inc.*, 739 F. Supp. 2d 364, 371 (S.D.N.Y. 2010), aff'd, 456 F. App'x 8 (2d Cir. 2011) ("Section 10(a)(3)'s ground for vacating arbitration awards based on "refusing to hear evidence pertinent and material to the

controverse" "has been narrowly construed so as not to impinge on the broad discretion afforded to arbitrators to decide what evidence should be presented."); *Aviles v. Charles Schwab & Co.*, Inc. 435 F. App'x 824, 828 (11th Cir. 2011). FINRA Rule 12604 affirms that "[t]he panel will decide what evidence to admit" and "[t]he panel is not required to follow state or federal rules of evidence." A court "may vacate an arbitrator's award under 9 U.S.C. § 10(a)(3) only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing." *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992). FINRA Rule 12514(c) allows the panel to exclude witnesses that have not been identified in advance of the hearing. R. 4-693.

Here, Leggett claims that the arbitrators' denial of two of Leggett's evidentiary requests was improper. R. 5-1256-58.

A. The Schwab representative

First, after Leggett's own expert provided testimony revealing that Leggett had been untruthful in response to a question from one of the arbitrators concerning Leggett's trading activities, Leggett's counsel told the arbitrators that the Charles Schwab representative's testimony was needed to rebut the testimony of his own expert witness. Leggett had not disclosed this Charles Schwab representative as a potential witness in a timely manner. Put bluntly, Leggett asked the Panel to allow the testimony of an undisclosed witness at the Arbitration hearing to impeach his

own expert witness. The arbitrators properly exercised their discretion by not admitting the testimony and deeming it to be cumulative and irrelevant. *Rai*, 739 F. Supp. 2d 364 at 371-72 (arbitrators must be given discretion to determine the admission of evidence that would be cumulative).

Leggett's explanation as to the alleged significance of this witness further reveals a lack of prejudice. *See Robbins*, 954 F. 2d at 685. Indeed, there can be no finding of prejudice because Leggett made no proffer concerning the impact of not having testimony from the Charles Schwab representative nor did Leggett recall Mr. Leggett to impeach the expert or provide clarity on the lies Mr. Leggett told to the panel.

The Order again resorts to improper conjecture and second guessing the arbitrators. R. 5-1256-57. The Order describes an arbitrator's alleged "close personal relationship" with the Charles Schwab representative and makes an unfounded, unsupported accusation that excluding the testimony was "undoubtedly influenced by the possibility that the appearance of the witness would require one of the three Arbitrators to recuse himself." R. 5-1258. This is wholly unsupported in the record. The arbitrators never said anything close to the trial court's speculative statement. The arbitrators simply stated that the testimony would have been irrelevant and cumulative.

B. The questioning of Klouda.

Second, the arbitrators also limited Leggett's line questioning for WFA expert witness, Mr. Klouda. Mr. Klouda created a summary chart of solicited and unsolicited trades at the arbitrators' request. R. 4-1127-30. The chart summarized evidence that was already in the record. *Id*. at 674. During Leggett's cross examination of Mr. Klouda, the arbitrators limited Leggett's cross examination to authenticating the chart of solicited and unsolicited trades. R. 5-1241. This decision was in the arbitrators' discretion and not grounds for vacatur under Section 10(a)(3). *Pitcairn Props*., 725 F.3d at 195.

In addition, there is no evidence that the limited cross-examination prejudiced Leggett. And the Order simply states that the line of questioning was omitted with no legal application as to why the omission was an error. R. 5-1258. That is not nearly enough to warrant vacatur of an arbitration award. *See Cat Charter, LLC*, 646 F.3d at 842–43.

4. The Arbitration Award Was Not Procured by Fraud in Violation of 9 U.S.C. § 10(a)(1).

Section 10(a)(1), in relevant part, permits a reviewing court to vacate an arbitration award in the exceedingly rare circumstance "where the award was procured by corruption, fraud, or undue means." The Eleventh Circuit applies a three-part test to review whether a party procured an award by fraud: (1) "the movant must establish the fraud by clear and convincing evidence;" (2) "the fraud must not

have been discoverable upon the exercise of due diligence prior to or during the arbitration"; and (3) the fraud must be "materially related to an issue in the arbitration." *Bonar v. Dean Witter Reynolds, Inc*., 835 F.2d 1378, 1383 (11th Cir. 1988). Leggett argues, and the trial court agreed, that the alleged fraud was based upon: (1) alleged "perjured" testimony of Mr. McKelvey; (2) Mr. Weiss's alleged "misrepresentation of the record" when he was simply objecting to questions by opposing counsel and correcting the record; and (3) the date of the production of WFA's policies and procedures on text messaging. R. 5-1258–61. Each argument lacks merit as explained below.

A. Jacob McKelvey's testimony was not perjury and did not amount to a violation of 9 U.S.C. § 10(a)(1).

The trial court's determination concerning Mr. McKelvey's testimony is based upon the faulty conclusion that Mr. McKelvey's testimony in June 2019 changed from his September 2018 testimony. R. 5-1259. But the court could not have assessed whether the testimony amounted to perjury because there is no record of Mr. McKelvey's September 2018 testimony. The Order cites alleged September 2018 testimony from a transcript of the FINRA hearing; however, this testimony is nowhere in the record and only appears, for the first time, in the trial court's Order which Leggett's counsel drafted, and the court rubberstamped, without verifying its accuracy in the record. *See* R. 5-1242. Therefore, it is not possible to compare the

September 2018 testimony with the June 2019 testimony and, as a result, Leggett could not establish fraud by clear and convincing evidence.

Although the September 2018 testimony has never been in the trial court's record, the Order concludes that Mr. McKelvey materially changed his September 2018 testimony in June 2019. R. 5-1259. This portion of the Order casts a shining light on the significant problems with the entire Order. Leggett's counsel drafted the Order and made these sort of false, misleading, or unsupported statements throughout. The trial court judge adopted the Order as drafted by Leggett's counsel almost verbatim without correcting the false, misleading, and unsupported statements.

Furthermore, Mr. McKelvey's alleged testimony does not amount to perjury even if the recitation of the September 2018 testimony in the Order drafted by Leggett's counsel is accurate. The trial court adopts Leggett's argument that perjury is McKelvey's act of making an affirmative statement about WFA's policies on text messages in September 2018, and then stating that he did not recall his September 2018 testimony. R. 5-1242–45, 1258–61. But "[c]ontradictions and changes in a witness's testimony alone do not constitute perjury," and, in this case, the trial court undertook no effort to describe how the testimony constitutes perjury. *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991); *Petrick v. Thornton*, 2014 U.S. Dist. LEXIS 166694, *41-42, 2014 WL 6626838 (M.D.N.C. Nov. 21, 2014) (holding that

"to the extent McNeill 'changed' his testimony, he did so in a manner fully consistent with good-faith clarification."). Thus, the allegedly perjured testimony does not amount to perjury at all, let alone testimony sufficient to warrant vacatur.

Also, there is no clear and convincing evidence of fraud through the alleged perjury. *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1552 (11th Cir. 1985) ("Fraud on the court is therefore limited to the more egregious forms of subversion of the legal process, . . . those we cannot necessarily expect to be exposed by the normal adversary process." (quoting *Great Coastal Express v. Bhd. of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982))); *see also O'Rear v. Am. Family Life Assur. Co. of Columbus*, 817 F. Supp. 113, 115 (M.D. Fla. 1993) ("Bare statements that evidence of perjury exists do not constitute clear and convincing evidence."). "Perjury constitutes fraud on the court only in special situations, such as when an officer of the court commits the perjury or the perjury prevents a critical issue or piece of evidence from coming before the court." *Myser v. Tangen*, 2015 U.S. Dist. LEXIS 14030, *14 (D. Wash. Feb. 15, 2015).

And even if fraud had existed, the two additional *Bonar* requirements are absent. *See Bonar*, 835 F.2d at 1383 (which requires discovery of the fraud upon the exercise of due diligence prior to or during the arbitration and that the fraud must materially relate to an issue in the arbitration). The alleged fraud here would have been discovered during the arbitration through the evidentiary process. Indeed,

according to Leggett, Leggett discovered the fraud during the cross-examination. Plus, the alleged fraud did not materially relate to an issue in the arbitration. The case was not about WFA's corporate text message policy or the number of trades that were solicited or unsolicited. The case was about whether WFA advised Leggett on the investments in question or whether Leggett made the decisions on his own (a topic upon which the panel found Leggett to be wholly unbelievable). R. 4-439–40.

B. Mr. Weiss's statements did not amount to a violation of 9 U.S.C. § 10(a)(1).

The court further concluded that Mr. Weiss suborned perjury when Mr. Weiss had simply objected to the fact that Leggett's counsel had misstated Mr. McKelvey's September 2018 testimony during Mr. McKelvey's June 2019 cross-examination. R. 5 at 1245, 1259–61. Given that there is no record before this Court of the September 2018 testimony, and hence no point of comparison for the court to assess an allegation of perjury, it necessarily follows that there is no evidence in the record that would have allowed the trial court to assess whether Mr. Weiss's objections were tantamount to suborning perjury.

The Order nonetheless accuses Mr. Weiss of "insert[ing] himself as a fact witness and purport[ing] to testify to the Panel himself to support the changed story." R. 5-1259–60. That is not the case. Mr. Weiss was simply objecting to Leggett's counsel's apparent mischaracterizations of the prior testimony in his role as WFA's counsel. In making its conclusions, not only did the trial court fail to cite to evidence

in the record, it failed to take the more informal nature of arbitration proceedings into consideration with respect to objections. FINRA Rule 12604 even states the "[t]he panel is not required to follow state or federal rules of evidence." R. 4-696–97. Equally important, the arbitrators would have fully understood that Mr. Weiss was speaking as an advocate, not a fact witness, and they would have factored his role in when considering his statements.

Moreover, Mr. Weiss's objections were not even material to the arbitration. Indeed, Leggett never attempted to argue or demonstrate how these interjections were material to the outcome or prejudicial. The Order nonetheless oddly concludes that "[t]he relevance of this testimony cannot be understated" and that the "Arbitrators were clearly misled" with no plausible explanation as to how they were allegedly misled. R. 5-1260. Even more bizarre is the fact that the Order cites the Arbitration Award's holding that "the Panel finds that neither Respondent Pickett nor Non-Party McKelvey engaged in any wrongful conduct" as evidence of having been misled. R. 5-1260. This statement amounts to a blatant substitution of the trial court's judgment for that of the three arbitrators. The mere fact that the arbitrators found that WFA's witnesses were credible (and Leggett not to be credible) does not lead to the conclusion that the arbitration panel was tricked into such a belief. The trial court's act of second guessing the credibility judgment by the arbitration panel is improper. *NF&M Corp. v. United Steelworkers of Am.*, 524 F.2d 756, 759 (3d Cir.

1975) ("Further, a court is precluded from overturning an award for errors in assessing the credibility of witnesses, in the weight accorded their testimony, or in the determination of factual issues.").

And even if Mr. Weiss's objections were inappropriate, they were certainly known and discoverable to opposing counsel at the time of the Arbitration hearing as they were made in real time, prohibiting any and all subsequent claims under Eleventh Circuit precedent. *See Bonar*, 835 F.2d at 1383 ("the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration").

C. The timing of appellants' exchange of Wells Fargo's Text Messaging Policies and Procedures did not amount to a violation of 9 U.S.C. § 10(a)(1).

The Order next states that WFA had "stonewalled producing" WFA's text message policies and this alleged act amounted to fraud on the panel. R. 5-1260–1261. But Leggett did not ask for WFA's text message policies until more than nine months after discovery had closed and just a few days before closing arguments. *Id*.; R. 4-397. Given this delay, WFA was within its right to resist the request, but instead provided the policies to Leggett a mere three days after Leggett had requested them. *Id*. Accordingly, the purported "fraud" of providing the text message policies was discoverable upon the exercise of due diligence prior to or during the arbitration, and the purported "fraud" of providing the policies did not materially relate to an issue

in the arbitration. In fact, Leggett's counsel did nothing with the text messaging policies after he received them.

As stated above, there was no evidence of stonewalling in the record. Leggett did not request the documents until after discovery closed and WFA produced it within three days[3]. Leggett did not ask the arbitrators to hold the record open for consideration of the document when it was produced and did not use the document, which further demonstrates the lack of this document's importance.

5. Determining the Cost and Fees Award Did Not Violate 9 U.S.C. § 10(a)(3)

"Only if the arbitrator acts outside the scope of his contractually delegated authority. . . may a court overturn his determination." *Sutter*, 569 U.S. at 569 (2013). FINRA Rule 12212 gives the Arbitrators broad authority to issue sanctions including "[a]ssessing monetary penalties payable to one or more parties," "[a]ssessing postponement and/or forum fees," and "[a]ssessing attorneys' fees, costs and expenses." R. 4-686. Moreover, as the court held in *Marshall & Co.*, "arbitrators have the power to award attorneys' fees pursuant to the 'bad faith' exception to the American Rule." *Marshall & Co., Inc v. Duke*, 941 F. Supp. 1207, 1213 (N.D. Ga. 1995), aff'd, 114 F.3d 188 (11th Cir. 1997). Given the Arbitrators' findings that Leggett lied about material elements of the case and that the case was without merit

[3] Rule 12507 of the FINRA Rules provides parties with 60 days to respond to document requests.

and false, it is reasonable to conclude that the costs and fees against Leggett were meant as a permissible sanction under FINRA Rule 12212.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the trial court's Order and instruct the trial court to enter judgment in favor of Appellants confirming the Award. In the alternative, as a result of the Order's explicit reliance upon evidence not in the record before the trial court, the Court should vacate the Order and remand for the trial court to consider the parties' motions in a manner consistent with the Court's instructions.

Respectfully submitted, this 4th day of April, 2022.

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CERTIFICATION

This submission exceeds the word count limit imposed by Rule 24. On April 4, 2022, the Court approved Appellants' request for a word count limit extension to 10,000 words. Beginning at Part One, this submission does not exceed 10,000 words.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing ***Brief of Appellants Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors, LLC and Jay Windsor Pickett III*** by the Court's eFAST system and United States mail to the following:

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